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Supreme Court of the United States

OCTOBER TERM 1940

No. 338

WELWEL WARSZOWER,
alias "Robert William Wiener", etc.,
Petitioner,

against

THE UNITED STATES OF AMERICA.

PETITIONER'S REPLY BRIEF

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We shall deal briefly with the most important misconceptions of our position by the government and with various legal points which we believe have been incorrectly stated by the Government.

1. The interpretation of the statute.

The chief argument of the government is that Congress must have intended to punish presentation of a passport to an immigration inspector because otherwise an alien would be "immune" who employed a fraudulent American passport to obtain entry (see Browder brief p. 9, Warszower brief pp. 12, 13). But there was no need for Congress to legislate on that subject, since long before the enactment of the Espionage Act it had been criminal falsely to claim American citizenship (Act of March 4, 1909, U. S. C. A. Title 18 § 141).* And it was under that earlier provision

*Derived from Act of July 14, 1870, Ch. 254, 16 Stat. 254.

of law that the prosecution was conducted in the *Duncan* case. That the government has proceeded here under the wrong provision of law is no reason for giving an improper meaning to that provision.

2. The evidence of presentation.

The government suggests (p. 15) that this Court should not consider this point because two courts have considered the evidence adequate. This rule is but a "conventional" one, and does not apply where "clear error" is shown or where constitutional issues are involved. See *United States* v. *Appalachian Electric Power Co.*, 85 Law Ed. Adv. 201, 206. Here the error is clear and the total absence of evidence raises an issue of due process.

The government fails utterly to meet the issue. It seeks (pp. 16-18) to interpret Faire's testimony (R. 46) to mean that it was his invariable practice when a manifest contained passport numbers to have the passport shown to him. But if the answer originally given might be so interpreted—which we dispute, since all Faire could testify about was that he asked for passports—Faire's later testimony (R. 50) cannot be disregarded as is attempted by the government in its footnote to page 17. It is there suggested that Faire's "not necessarily" testimony referred, not to the particular list involved in this case, but to his general practice. The difficulty, however, with this argument is that Faire was precisely then talking about "that manifest" (R. 50) and it was the earlier testimony, relied upon by the government (R. 46), that was based on his practice. Moreover if all Faire's testimony was based on practice it cannot be one kind of practice for the government and another for the defense. The plain truth of the matter is

that Faire's testimony conclusively establishes that he could not be sure that petitioner had presented his passport.

For Faire testified that he had no recollection of the occasion and was able to testify only because he relied entirely on the passport number on the manifest, which number was on the manifest before it reached the witness, and that the entries on the manifest as produced in court were the same as they would have been had petitioner been admitted on some document other than a passport. And, when specifically asked by the court whether the checkmark against the name (the only mark made by the witness) indicated the admission of the passenger on a passport, his answer was "not necessarily". This is not evidence to the effect that petitioner presented a passport.

The Government's contention (p. 18) that Faire's "invariable practice" permitted him to be certain that he had seen the passport ignores the witness' testimony that persons were admitted without presenting passports, that the manifest did not show when that was the case and that the checkmark did "not necessarily" indicate that any particular person was admitted on a passport. Thus the testimony as a whole completely negates the possibility that there was any "invariable practice" to have a passport shown.

Apparently recognizing the absence of evidence on the subject the government is driven to the argument (p. 18) that the jury might have inferred that the passport was presented because, says the government, "it is clear that he had the passport in his possession when the manifest was made up." There is no such evidence in the record—the purser who apparently made up the manifest (R. 42, 49) was not a witness. Nor was the case tried on any such theory. For the Court charged, at the request of the de-

fense, that the jury might not base one inference upon another (R. 195).

3. The law as to admissions.

Before discussing the legal questions presented we wish to take issue with the statement in the government's brief (p. 19) that petitioner does not contest the "adequacy of the proof" that he falsely stated his name or place of birth. That is not correct. Petitioner is not here challenging the propriety of submitting those issues to the jury; he has never conceded the charges made.

The government in rejecting the application to this case of the general rule requiring corroboration of admissions relies largely on *U. S.* v. *Miles,* 103 U. S. 304, (cited p. 22) and *U. S.* v. *Wood,* 14 Pet. 430 (cited pp. 37, 40). Neither case is apposite.

In the *Miles* case the issue was a former marriage. The defense did not contend, as was contended here, that evidence of admissions was insufficient without corroboration, but that proof of a marriage was improper except by witnesses present at the ceremony. The brief statement of this Court approving a charge which permitted conviction upon the admissions of the defendant can, therefore, be given no significance. Whenever the issue has been clearly raised in bigamy cases, the ruling has been that admissions alone are not enough to establish the first marriage. (See cases cited p. 34 of the original brief).

The *Wood* case is also not authority for the rule that conviction may be had on the uncorroborated admissions of the defendant. No such question was raised in that case. There again the defense sought to rely, not on the general rule, but on a special rule in perjury cases requiring at

lease two witnesses. This Court merely decided that where the falsity of the statement charged to the defendant was proved by unimpeachable documents, it would be absurd to require oral testimony. In that case the question was the price which had been paid for certain merchandise. The government proved from the books of defendant that he had paid a higher price than stated in the questioned oath. The evidence was accepted not as an admission inconsistent with the sworn statement, but as proof of a fact contrary to what was there asserted. Such was the view of that case taken by Mr. Justice Butler in *Hammer* v. *U. S.*, 271 U. S. 620, 627 (cited on p. 40).

The government leans heavily on Prof. Wigmore. Of his valuable services in the field there can be no question, but he tends to ignore that humanity which even the criminal law preserves and shows a definite bias in favor of the prosecution; a bias not accepted by the courts. Thus this Court has maintained its salutary implementation of the Fourth Amendment from *Weeks* v. *United States*, 232 U. S. 383 (1914) to *Nardone* v. *United States*, 308 U. S. 338 (1939), despite Wigmore's persistent disapproval. (Wigmore, Evidence, 1st ed.—1905—§ 2264, pp. 3125-7; 2nd ed.—1923—Vol. IV, §§ 2183, 2184, pp. 626-39, § 2264, pp. 867-71; 3rd ed.—1940—Vol. VIII, §§ 2183, 2184, pp. 4-40, § 2264, pp. 366-72; Using Evidence Obtained by Illegal Search and Seizure—1922—8 A. B. A. J. 479).

And the government has sought (p. 24) to support Wigmore by appeal to the authority of Greenleaf. This attempt has miscarried. For the government has but brought forth the young Wigmore to uphold the old. The entire quotation from section 213 on pages 24 and 25 of the government's brief was written, not by Greenleaf, but by Wig-

more as editor of the 16th edition.* And the citation of Jones on Evidence (p. 25) throws no light whatever on the problem here involved, since that author does not discuss it. (The reference to § 295 is an error, perhaps § 893 was intended.

Nor is the government accurate in suggesting (p. 24) that Chamberlayne is authority for the proposition that admissions have the same effect in criminal as in civil cases. For in § 1390 of his work that author recognizes the difference as contended by petitioner.

While it is true that the English courts have not adopted a definite rule as to corroboration it is not accurate to say (p. 27) that either they or the Massachusetts courts have explicitly rejected it. See *Com.* v. *Zelenski,* 287 Mass. 125.

The Government in its brief (pp. 11, 35-40) apparently misconceives our position in referring to the perjury cases. We have not contended for the application of any special rule as to the quantity of evidence. We are not concerned with the number of witnesses needed in perjury prosecutions, but with the rule, that conviction may not be based alone on prior inconsistent statements of the defendant, whether under oath or not. This rule was reaffirmed not only in the *Hammer* case cited by the Government (p. 40) but in the *Harris* case recently decided by this Court (85 Law. Ed. Adv. 141). Its universality has never been questioned. While it is true that the rule has been changed by statute in a number of jurisdictions, such as New York and New Jersey (see government's brief, p. 39 footnote 7), there is no instance of its rejection by any American court

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***The entire quoted matter is printed in brackets in that edition, proof that it was written by the editor—see p. VII —who was Wigmore. *Cf.* 15th ed. in which this is not found.**

in the absence of statute. The various cases in the Federal Court cited on page 40 deal with entirely different subjects.*

The suggestion (p. 36) that, by analogy to bankruptcy cases, the rules with regard to perjury do not apply here, is without foundation. The cases cited have nothing to do with the subject of admissions, but only with the technical rule concerning two witnesses, a rule which both of the cases point out has been modified by the *Wood* case. Moreover, in holding that the perjury rule did not apply to false swearing in bankruptcy, the Court in both of these cases was influenced by the fact that Congress had enacted a special law dealing with false swearing in bankruptcy with a penalty considerably less than that provided for perjury. However, the punishment under the statute in the case at bar is identical with that provided for perjury, namely, $2,000 maximum fine and five years maximum imprisonment. (See U. S. C. A. Title 18 § 231.)

4. The alleged corroboration.

a. There is no substance to the contention (p. 29) that the Haverford manifest constituted corroboration on the issue of citizenship. On the assumption made by the government (pp. 4, 29) that the information therein contained was based on statements made by petitioner,** this manifest constituted one of the admissions relied on by the government. But it cannot be given the additional feature now

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*In the *Sullivan* case the conviction was reversed; in the *Gordon* case only the two witness rule was involved; in the *Jacobs* case the evidence against defendant was documentary, but did not consist of admissions—indeed that subject was not discussed in any of the cases.

**The record (R. 85, 86, 89) hardly confirms the assumption.

claimed by the government of constituting independent proof of the facts, especially since at the trial government counsel conceded that this manifest amounted to "nothing but his own declaration" (R. 177). An admission does not become independent proof merely because it is preserved in a public record—and the cases cited (p. 29) do not so hold. Moreover, the *Duncan* case is explicit authority against the government.

And the same case is authority for rejecting the false claim of a specified native birth as corroboration.

We have already discussed (main brief, p. 40) the only other evidence relied on, the meagre and incomplete proof concerning the absence of an application for naturalization. We should like to add this. Had petitioner applied for naturalization that act would have been relied on by the government as corroboration of his admissions. Surely failure to apply for naturalization cannot also be such corroboration.

We are at a loss to understand the reference to the war in Europe (p. 31). Soviet Russia is not at war and there is no basis for the suggestion that it would have been impossible to obtain a duly authenticated record of petitioner's birth in Russia, if that was the fact. The "enormous" difficulty of proof for which the *Duncan* case was cited was not a difficulty of proof at all, but a carelessness in authentication. Moreover, as Judge Chase said in *United States* v. *Buchalter*, 88 F. 2nd 625 at 626:

> "Difficulty of proof is no substitute for actuality of proof and an accused is presumed to be innocent and entitled to be acquitted until proved guilty as charged beyond a reasonable doubt."

Finally, the government (p. 32) misconceives the rule we rely upon. We have not asserted that the independent proof must establish the *corpus delicti*. We readily accept the formulation of the rule contained in the most recent of the cases cited by the government, *Gregg* v. *United States,* 113 F. 2nd 687, that the corroborating evidence

> "need not . . . of itself sufficient proof of guilt but need only by a substantial showing which, together with the defendant's confession or admission, establishes the crime beyond a reasonable doubt."

Within that rule there have been many decisions reversing convictions. We believe that an examination of the cases will indicate that the case at bar falls within their category rather than within the category of the cases cited by the government (p. 32) in which the corroborating evidence was held adequate. In addition to the cases cited in our original brief (pp. 29, 32, 33, 34), we refer to: *United States* v. *Mayfield,* 59 Fed. 118; *Naftzger* v. *United States,* 200 Fed. 494; *Goff* v. *United States,* 257 Fed. 294; *Martin* v. *United States,* 264 Fed. 950; *Tingle* v. *United States,* 38 F. 2nd 573.

b. The contention (p. 34) that if there was a presentation of the passport that constituted corroboration is utterly without support. The rule laid down in the *Forte* case is not harsh, nor, so far as appears, a minority view. There is nothing in the New York cases cited by the government (pp. 34, 35) which supports its contention. In both these cases there had been independent proof of the crime, homicide in the one instance, driving while intoxicated in the other. The additional elements involved, the felony and the previous offense affected only the degree of crime. In the

Warner case it appeared that defendant had admitted the prior conviction in open court, (see 244 App. Div. 833). But in the case at bar presentation of a passport was not a crime and did not become a crime until fraud in its procurement was shown. To say that proof of the presentation alone constituted proof of the *corpus* is to depart from all hitherto accepted concepts of the criminal law. Moreover, when the New York Court of Appeals has been confronted with an issue of corroboration of a vital element in the crime it has shown a scrupulous regard for the rights of the accused. See *People* v. *Oley, People* v. *Feolo, People* v. *Maione,* decided December 31, 1940, not yet reported.

Respectfully submitted,

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